Supreme Court, U.S.
FILED
05-167 JUL 28 2005
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

BP CARE, INC.,

Petitioner,

v.

MICHAEL LEAVITT, Secretary, United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 42 C.F.R. § 488.432(a) confers the right to request or waive an administrative hearing upon the physical location of a Medicaid "facility," or whether it confers that right upon the legal entity owning and operating the "facility."

2. Whether a Medicaid nursing home provider has successor liability when it is denied due process in the administrative appeal and a subsequent withdrawal thereof by a third party?

PARTIES TO THE PROCEEDINGS

Petitioner is BP Care, Inc., an Ohio corporation which was later merged out of existence as described in the Rule 29.6 Statement below.

Respondents are Michael Leavitt, Secretary, United States Department of Health and Human Services, and the United States Department of Health and Human Services, the federal agency responsible for regulating the Medicare and Medicaid programs. Michael Leavitt is substituted for his predecessor, Tommy Thompson, as Secretary of United States Department of Health and Human Services pursuant to Fed. R. App. P. 43(c)(2).

RULE 29.6 STATEMENT

BP Care, Inc., was a corporation organized under the laws of the state of Ohio, operating a skilled nursing facility located in Middletown, Ohio, known as the Residence at Kensington Place. BP Care, Inc., merged into RCR North, Inc., on May 1, 2001, which merged into Regal Care Residences, Inc., on September 12, 2002. Both RCR North, Inc., and Regal Care Residences, Inc., were corporations organized under the laws of the state of Ohio. Regal Care Residences, Inc., ceased operations and was dissolved on December 30, 2004. The affairs of Regal Care Residences, Inc., including any potential liabilities of BP Care, Inc., are being wound up by the shareholders of Regal Care Residences, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner BP Care, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for Sixth Circuit is published at 398 F.3d 503 (6th Cir. 2005). Petition for rehearing was denied without opinion. An unpublished order issued May 3, 2005.

The opinion of the United States District Court for the Southern District of Ohio is reported at 337 F.Supp.2d, 1021 (S.D. Ohio 2003).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on February 15, 2005, and its order denying rehearing on May 3, 2005. (App. at 3a and 1a.) The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of 42 C.F.R. § 483.5; 42 C.F.R. §§ 488.432, 488.434, 488.436, and 488.438; 42 C.F.R. §§ 489.11 and 489.18; and 42 C.F.R. Part 498 are reproduced in the appendix to this petition (at 41a).

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Sixth Circuit affirming a decision of the United States District Court for the Southern District of Ohio which upheld the determination of a federal administrative agency to impose upon the successor operator of a skilled nursing facility, without according the successor due process of law, the liability of paying for a civil money penalty ("CMP") assessed against the previous operator.

This case arose when the Centers for Medicare & Medicaid Services ("CMS"), the division of the United States Department of Health and Human Services responsible for overseeing the Medicare and Medicaid programs, (hereinafter "the Secretary") sought to collect from BP Care, Inc. ("BP Care"), as the successor operator of a skilled nursing facility, a CMP originally imposed against West Chester Management Company, Inc. (hereinafter "West Chester") for West Chester's failure to comply with certain Medicare and Medicaid certification requirements during its operation of the nursing facility.

Prior to August 1, 1999, West Chester leased and operated a skilled nursing facility located in Middletown, Ohio known as Barbara Parke Care Center (the "Facility"). In February 1999, the Secretary conducted an inspection of the Facility to determine whether West Chester was operating the facility in substantial compliance with Medicare and Medicaid certification requirements (hereafter "the Survey").

Federal law requires nursing homes to submit to periodic inspections, called "surveys," to ensure they remain in "substantial compliance" with Medicare and Medicaid standards. See 42 C.F.R. § 488.305. If a facility is found to

be out of substantial compliance the Secretary may impose various remedies, including nonpayment for newly admitted Medicare and Medicaid residents, termination of the facility's Medicare and Medicaid provider agreements, license revocation, and CMPs ranging from $50.00 to $10,000.00 per day. See 42 U.S.C. §§ 1395i-3(h) and 1396r(h).

During the Survey the Secretary found West Chester to be out of substantial compliance and imposed penalties including a CMP totaling $35,650. West Chester disagreed with the Survey and requested an administrative review (hereafter, the "Administrative Appeal").

Several months after the Administrative Appeal was filed, West Chester became insolvent. On August 1, 1999, while the Administrative Appeal was pending, West Chester abruptly abandoned its lease and ceased operating the Facility.

BP Care, an independent party totally unrelated to West Chester or the owner of the premises, immediately stepped in on an emergency basis to operate the Facility so that the delivery of care and services to the residents would not be interrupted. BP Care eventually assumed the lease and Medicare provider agreement effective August 1, 1999, and continued to operate the Facility. Prior to August 1, 1999, BP Care had no knowledge of, relationship with, interest in, or control over either West Chester or the Facility.

On September 19, 1999, West Chester filed for Chapter VII bankruptcy protection in the United States Bankruptcy Court, Southern District of Ohio, Western Division, assigned to Judge Burton Perlman as Case No. 99-15042 ("Bankruptcy Case"). West Chester's bankruptcy trustee (the "Bankruptcy Trustee") elected to carry on with the Administrative Appeal and served the administrative law judge ("ALJ") assigned to

the proceeding with a "Suggestion of Bankruptcy Filing." Consequently, the Secretary filed a proof of claim in the Bankruptcy Case for the $35,650 CMP.

Once the ALJ learned of the Bankruptcy Case he issued an order dismissing the Administrative Appeal and remanding the matter to the Secretary with instructions for the Secretary to issue a new hearing notice to all parties, including BP Care. The Secretary, however, refused to issue such a notice.

Instead, the Secretary moved to vacate the ALJ's dismissal and remand order arguing that the Bankruptcy Court's automatic stay did not affect the Administrative Appeal. The ALJ ultimately agreed and ordered reinstatement. In the order the ALJ also held that BP Care was liable for West Chester's $35,650 CMP because BP Care had assumed West Chester's Medicare provider agreement, even though BP Care was never made a party to the Administrative Appeal as the ALJ himself had ordered.

The Secretary now looks to BP Care for payment, presumably because West Chester cannot pay, despite the lack of due process and the proof of claim filed in the Bankruptcy Case.

Following reinstatement the Bankruptcy Trustee refused to authorize further expenditures for the Administrative Appeal and on or about May 23, 2001, unilaterally withdrew the Request for Hearing. The Trustee never notified BP Care of its intentions to withdraw or sought BP Care's consent or cooperation despite the fact that it was aware of the Secretary's intent to collect the CMP from BP Care.

The Secretary accepted the Trustee's notice of withdrawal and dismissed the Appeal outright as to both West Chester